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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 552.

THOMAS J. O'NEILL,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, N. Y. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Thomas J. O'Neill, hereby respectfully requests this Honorable Court to issue writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment of that Court which affirmed the decision and Order of the Tax Court of the United States in this proceeding.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit (R. 56-61) is reported in 170 F. 2d 596.

The findings of fact and memorandum opinion of the Tax Court (R. 13-19) are unreported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 12, 1948 (R. 63).

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code.

Questions Presented.

The questions presented are as follows:

First: Whether, in the absence of a tax motive, a stockholder's loans to a wholly-owned corporation, dealing in real estate over a period of twenty-four (24) years, may be disregarded as such merely because there is no affirmative demonstration of a "business purpose" in choosing the corporate form?

Second: Whether the "business purpose" test is not met, if the corporate form was used to avoid obtaining the signature of the stockholder's wife because of her dower rights?

Third: Whether a real estate corporation, buying and selling real estate, receiving rent and proceeds of sales, taking title to real estate, paying business expenses and issuing financial statements and balance sheets, is not carrying on business within the meaning of the law.

Statutes Involved.

The statutes directly involved are Section 23(g) and (k) (26 U. S. C., 1946 ed., Sec. 23) and Section 117(b) of the Internal Revenue Code (26 U. S. C., 1946 ed., Sec. 117).

Summary Statement of Facts.

The Court of Appeals reviewed the Tax Court determination, pursuant to Section 36 of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., amending Section 1141(a) of the Internal Revenue Code in such manner as in effect to expurgate the *Dobson* decision—so far as it pertains to the scope of review exercised by the Courts of Appeals over the Tax Court—from the general body of federal tax law. Its findings of fact may be summarized as follows:

The petitioner, a practicing lawyer, deducted from his income tax return, for the calendar year 1941, as bad debts, the full amount of the unpaid remainder of advances he had made over many years to two (2) corporations, wholly owned by him, which were dissolved in 1941. The Commissioner disallowed these deductions as bad debts but, treating the advances as capital investments, allowed the deduction of only one-half of the unpaid remainder as capital losses and determined a deficiency of $16,777.05, in the income taxes of the petitioner (Section 23(g) of the Internal Revenue Code, 26 U. S. C. Sec. 23(g)).

Two wholly-owned corporations are involved. In 1917 the petitioner organized the 123 Locust Hill Avenue Company, Inc., the major debtor, with an authorized capital of $2,000 which was paid in. In 1936 he organized the 123 Hillcrest Avenue Corporation with an authorized capital of $1,000 which was paid in. Both corporations were dissolved in 1941.

The petitioner received no note or other evidence of indebtedness.

Tax returns for the two (2) corporations were regularly filed. In addition, the Tax Court found

and the Court of Appeals quotes from its findings (R., 15, 58):

> "Working papers of accountants and financial statements were prepared from lists of receipts and disbursements for the account of the corporations, and check books and bank statements of the petitioner. Balance sheets and other financial statements of the corporations listed the advances made by the petitioner as loans payable. The amounts were referred to as such during conversations between petitioner and accountants employed by him. Checks received by the corporations from the sale of property were endorsed to petitioner and thereafter treated as repayments of loans."

The petitioner furnished what money was needed, in addition to the $3,000 of authorized capital which he had paid in and the Tax Court found, and the Court of Appeals repeats, that "amounts so paid by Petitioner were regarded as advances to the corporations" (R. 15, 58).

Both corporations were organized primarily to hold the title to real estate and to enable the petitioner to sell it, or otherwise deal with it, without his wife's signature to deeds or other documents.

The Court of Appeals stated that no thought of its effect upon taxation prompted petitioner's election of the way he chose to deal in, or invest in, real estate.

Decision of the Court of Appeals.

The following language from the Court of Appeals opinion fairly summarizes its interpretation of the Tax Court decision and its own holding:

"It is apparent that the Tax Court did not re-

gard these corporations as non-existent for tax purposes and bypass them entirely in redetermining the petitioner's income taxes for the year here involved. It gave effect to their dissolution in the taxable year as the event which made it possible to determine gain or loss on the theory that the petitioner's advances for their account were contributions by him to their capital. Nevertheless the Tax Court must be assumed, though it did not quite say so in words, to have refused to treat the two corporations as entities so separate and distinct from the petitioner that he could create debts payable by them to him by advancing money for their use with the intent that those advances should be repaid by them.

"For, ordinarily, this intent to make the advances as loans would fix their status as such. See *Edward Katzinger Co.* v. *Commissioner,* 7 Cir., 129 F. 2d 74; *Van Clief* v. *Helvering,* App. D. C., 135 F. 2d 254; *Fairbanks, Morse & Co.* v. *Harrison,* 63 F. Sup. 495. But that presupposes that the borrower, if a corporation, serves some business purpose substantial enough to make it for tax purposes something more than another name for the lender" (R. 58, 59).

* * * *

"We think it is well within the 'unusual' category above mentioned and that the Tax Court did not err when it treated as one for debtor and creditor purposes the man who provided the advances and his corporations which did no recognizable business of their own" (R. 61).

Specification of Errors to be Urged.

The Court of Appeals erred:

First: In holding that in the absence of a tax motive, a stockholder's loans to a wholly-owned corporation, dealing in real estate over a period of twenty-four (24) years (and to the second corporation) may be disregarded as such merely because there is no affirmative demonstration of a business purpose in the use of the corporate form.

Second: In holding that the use of the corporate form, in order to avoid delay of real property sales in obtaining the signature of stockholder's wife because of her dower rights, is not a business purpose.

Third: In holding that a real estate corporation, buying and selling real estate, receiving rent and proceeds of sales, taking title to real estate, paying business expenses and issuing financial statements and balance sheets, did not carry on business within the meaning of the law.

Reasons for Granting the Writ.

The decision of the Court of Appeals erroneously applies and is also in conflict with the decision of this Court in *Moline Properties, Inc.* v. *Commissioner*, 319 U. S. 436.

a. The petitioner urges that in the absence of sham it is an unwarranted extension of any doctrine found under any authority, be it under *Gregory* v.

Helvering, 293 U. S. 405, or *Higgins* v. *Smith*, 308 U. S. 473, to require the demonstration of a "business purpose" in order to recognize the reality of a corporation honestly maintained over a period of twenty-four (24) years.

The Court of Appeals has found that the petitioner organized the major corporation in 1917 and "* * * that no thought of its effect upon taxation prompted his selection of the way he chose to deal in, or invest in, real estate * * *", and it further was found that "balance sheets and other financial statements of the corporation listed the advances made by the Petitioner as loans payable" (R. 60-61, 58).

With these conclusions of fact the petitioner is in complete accord.

May the Commissioner or a Court then test the business judgment of the petitioner in selecting the corporate form?

The Court of Appeals states that "the decisive question is whether the corporations were created to, or did, in fact serve a recognizable business purpose".

The Court of Appeals cites two decisions of this Court (R. 60, 61).

The first is *Moline Properties, Inc.* v. *Commissioner*, 319 U. S. 436; but there the Supreme Court merely held that the taxpayer was bound by his election to use the corporate form. The case is no authority for an opposite conclusion.

True, the Supreme Court discussed the circumstances under which the corporate entity might be disregarded. But the *Higgins, supra*, and *Gregory, supra*, cases, cited by the Supreme Court in that connection, were both obviously cases of unreality and

sham. This Court, in its *Moline* opinion, characterizes both of the aforementioned cases thus:

> "* * * in such situations the form is a bald and mischievous fiction."

The second decision of this Court, cited by the Court of Appeals is *Higgins* v. *Smith*, 308 U. S. 473, and this authority has been clearly distinguished from this case in the preceding paragraph.

(b) If, under the facts of this case, "business purpose" must be demonstrated, this test is clearly met.

In analyzing the distinction taxwise between a wholly owned corporation and its owner this Court established the following principle:

> "Whether the purpose be to gain advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity" (*Moline Properties, Inc.* v. *Commissioner, supra*).

According to the Court of Appeals, the "only disclosed reason" for the organization of the corporations and for their being kept in existence until they were dissolved was to make it unnecessary for the petitioner to procure, from time to time, his wife's signature to some papers (R. 60).

As far as the facts are concerned, the petitioner must accept the foregoing statement of the Court of

Appeals, although he, as an attorney, was well aware of the limited liability connected with corporate form and expressly so testified:

> "In other words, as to those things I was to advance the money as a loan to my own corporation, which I was controlling, which looked safe enough to me" (R. 51, 52).

However, the reason for the organization of the corporations, referred to by the Court of Appeals, clearly represents the equivalent of business activity within the meaning of the *Moline* case.

Under New York State law, if the vendor of real property is a married man, his wife must join in the execution to exhaust her inchoate right of dower, providing the property was acquired before September 1, 1930 (Sections 190, 207 New York Real Property Law; Harvey, "Title Closing," second edition, New York 1946, page 120).

Accordingly, a purchaser of real estate cannot be compelled to complete his purchase or accept the title if there is an encumbrance on the property which the vendor cannot or will not remove, and which the purchaser cannot, himself, remove by an application of the purchase money. Inchoate rights of dower are in the nature of such encumbrances (Maupin, "Marketable Title to Real Estate", third edition, 1921, pages 851, 855).

When the petitioner selected the corporate form in order, among other motives, to facilitate real estate transactions with regard to his wife's dower rights, this purpose of the petitioner is, contrary to the Court of Appeals' assumption, clearly the equivalent of business activity within the meaning of *Moline Properties, Inc.* v. *Commissioner* (*supra*). Except for

mere formalities, it is difficult to see what petitioner could have done in 1917 other than he did do when he adopted the traditional corporate form for trading in real estate. His consideration of the very real complications connected with his wife's dower rights indicates the *reality* of the corporations and refutes conclusively the argument of sham and unreality.

c. Furthermore, this purpose of the petitioner *was followed by the carrying on of business by the corporations.*

The facts found by the Court of Appeals reveal;

that the corporations received rent;

that they received proceeds of sales of real property;

that they took title to real property;

that they paid expenses incident to the acquirement, ownership and sale of real property;

that they received checks and endorsed same to the petitioner in partial repayment of his advances;

that they prepared financial statements showing receipts and disbursements;

that they prepared balance sheets.

The corporations dealt in real estate and only in doing so suffered the substantial losses which gave rise to this litigation.

Thus, both alternative conditions for the recognition of the separate taxable entity of a corporation, as established by this Court in the *Moline Properties,*

Inc. case, have been clearly complied with in this case, viz., the petitioner's *initial purpose was the equivalent of business activity,* and the corporate organization was followed by the *carrying on of business,* which resulted in the worthlessness of petitioner's loans.

The first case cited in the Court of Appeals opinion on the sole issue was *Commissioner* v. *National Carbide Corp.,* 2 Cir. 167 F. 2d 304. Upon information and belief, this Court granted a writ of certiorari in that case and it is presently on review before this Court. It would be manifestly unjust for petitioner to be foreclosed from further consideration of this case if *Commissioner* v. *National Carbide Corp., supra,* is under review by this Court. Granting of this writ is the only effective means of preserving petitioner's equities.

The unwarranted extension of the doctrine of the *Moline* case to achieve the opposite result of piercing rather than upholding the corporate entity, in a case with no motive of sham or tax avoidance, would mean that a taxpayer organizing the traditional real estate corporation would be faced with the alternative of having the entity recognized under the *Moline* case if that would hurt him taxwise and having the corporate entity disregarded, as well, if that would hurt him taxwise. The possibility of this unhappy alternative is recognized quite explicitly in the opinion of the *Moline* case, but was very carefully restricted to instances of sham and unreality and never intended to be extended to a twenty-four-year-old real estate corporation organized with no tax motivation and in perfect good faith. The uncertainties and dangers of

such a radical extension and misunderstanding of the *Moline* doctrine suggest review by this Court.

If the decision below, so obviously in conflict with the principles enunciated by this Court, be permitted to stand, the legitimate business operations of many corporations will be open to attack. The doctrine of disregard of corporate entity would be applied and extended far beyond the limitations stated by this Court.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 552

THOMAS J. O'NEILL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 13-19) are not reported. The opinion of the Court of Appeals (R. 56-61) is reported at 170 F. 2d 596.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1948 (R. 62). The petition for a writ of certiorari was filed on February 7,

1949. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

Whether, under the facts of the case, taxpayer's losses on advances he made to his wholly-owned corporations are deductible as bad debts under Section 23 (k) of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 23 [as amended by Sec. 113 (a), Revenue Act of 1943, c. 63, 58 Stat. 21]. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (k) *Bad Debts.*—
>
> (1) *General Rule.*—Debts which become worthless within the taxable year; * * *.

(26 U.S.C. 1946 ed., Sec. 23.)

STATEMENT

The facts found by the Tax Court (R. 13-16) are as follows:

Taxpayer, a resident of Avon-by-the-Sea, New Jersey, is and has been an attorney since 1897, and, during such period, has devoted nearly all of his time to his specialty of representing clients in negligence cases (R. 13).

In 1917, taxpayer organized the 123 Locust Hill Avenue Company, Inc., hereinafter referred to as Locust, under the laws of New York, with an authorized capital stock of $2,000, all of which was issued to, and paid for by, taxpayer at that time. Taxpayer has at all times been president, a director and sole stockholder of Locust. (R. 13.)

From time to time after the organization of Locust until the close of 1940, taxpayer advanced to it, for its account, certain sums of money. During that time Locust paid back, or caused to be paid to taxpayer, other sums of money. At no time after the first advance was the net advance reduced to zero. (R. 14.)

With respect to the advances, taxpayer did not receive certificates of stock or other documentary evidence of a capital investment, or a note or other evidence of a debt, or dividends or interest. There were no formal meetings of the directors of Locust with respect to the advances, nor any resolution characterizing the advances as loans or investments. (R. 14.)

On January 1, 1941, the net amount of the advances was in excess of $188,494.36. Locust was completely liquidated and dissolved in 1941. Application to the advances of the sums distributed to the taxpayer in liquidation reduced the amount of the advances to $188,494.36, and taxpayer was unable to make any further recoveries on his advances. (R. 14.)

The above facts, with respect to Locust, are the same in the case of 123 Hillcrest Avenue Corporation, hereinafter referred to as Hillcrest, except that it was organized in 1936, with a capital stock of $1,000, and the net amount of the advances on which no recoveries could be made, after the liquidation and dissolution of the corporation in 1941, was $7,713.63 (R. 14).

The corporations did not maintain bank accounts. Expenses and other debts of the corporations, including amounts for the purchase of property and advances in and after 1938 to the Barclay Holding Corporation, were paid by checks drawn on taxpayer's bank account. Amounts so paid by taxpayer were regarded as advances of taxpayer to the corporations. Excluding bonded indebtedness and advances made by taxpayer, the corporations did not borrow any money. (R. 14-15.)

Taxpayer and the corporations did not keep regular books of accounts. Working papers of accountants and financial statements were prepared from lists of receipts and disbursements for the account of the corporations, and check books and bank statements of taxpayer. Balance sheets and other financial statements of the corporations listed the advances made by taxpayer as loans payable. The amounts were referred to as such during conversations between taxpayer and accountants employed by him. Checks received by the corporations from the sale of property were

endorsed to taxpayer and thereafter treated as repayments of loans. The corporations did not purchase any property after 1929. (R. 15.)

The income tax returns of Locust for 1917, 1918, 1919, 1922, and 1923 reported no gross income or deductions. The returns for 1917, 1918, and 1919 contained statements that the corporation owned and held title, for the benefit of taxpayer, to the private dwelling located at 123 Locust Hill Avenue, Yonkers, New York, which was being occupied by him as a dwelling, that the corporation had no income, and that taxpayer paid all of the expenses of the property. The 1922 and 1923 income tax returns of Locust contain statements that it owned private dwelling houses located at 76 and 123 Locust Hill Avenue, that the corporation held the premises for the benefit of taxpayer, and that taxpayer paid all the expenses of the properties. (R. 15.)

The capital stock return of Locust for the fiscal year ended June 30, 1920, executed by taxpayer on July 16, 1919, as president and treasurer, contains a statement that taxpayer was using the premises at 123 Locust Hill Avenue as a private residence, and paid all of the expenses of the property and premises at 76 Locust Hill Avenue, acquired in 1918 or 1919, and that the corporation was indebted to him in the amount of $26,225. The property located at 123 Locust Hill Avenue was reported in balance sheets at a cost of $40,000. Comparative balance sheets for Locust for the year 1931 and

thereafter to the time of liquidation in 1941 list a mortgage outstanding against the property in the amount of $18,000 during the years 1931 to 1936, inclusive, and at decreased amounts thereafter, and disclose that it had an operating deficit each year. (R. 15-16.)

The balance sheet of Locust at the close of 1940, as reported in its income tax return for 1940, shows assets of $286,314.64 and loans payable in the amount of $264,668.22. The advances of taxpayer to Locust increased from $233,631.24, the total at the close of 1931, to $267,161.15 at the time the corporation was liquidated. (R. 16.)

Balance sheets of Hillcrest at the close of the years 1937 to 1940, inclusive, list as its sole tangible asset one parcel of real estate at about $16,500, mortgage payable in the amount of $9,000 at the close of 1937 and $8,000 in subsequent years, and disclose an operating deficit each year (R. 16).

Title to real property was taken by taxpayer in the name of the corporations instead of himself to obviate the necessity of obtaining his wife's signature when sales thereof were made (R. 14).

In his return for 1941, taxpayer claimed as bad debt deductions the amounts of $188,494.36 and $7,713.63 advanced to the corporations. The Commissioner disallowed the amounts as bad debt deductions and allowed one-half thereof, a total of $98,104, as a long-term capital loss, upon the ground that the advances constituted additional

investments in the capital stock of the corporations. (R. 16.)

The amounts advanced to the corporations by taxpayer were not loans (R. 16).

The Tax Court upheld the Commissioner's action in treating the advances as capital investments rather than loans (R. 16-19). The decision of the Tax Court was affirmed on appeal on the basis of a conclusion that taxpayer's advances were in practical effect made to himself, it being proper under the circumstances of the case to disregard the separate entities of the corporations (R. 56-61).

ARGUMENT

Contrary to taxpayer's assertion (Pet. 6), the decision below is not in conflict with, and does not erroneously apply, this Court's decision in *Moline Properties* v. *Commissioner,* 319 U. S. 436.[1] That decision is relied upon by taxpayer solely for a statement therein to the effect that a corporation remains a separate taxable entity so long as its purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation (Pet. 8). The court below quoted that statement in its opinion, assumed its applicability,

[1] Quite apart from the theory adopted by the court below, its decision can be grounded on the Tax Court's factual determination that the amounts in question were not loans but capital contributions (R. 16-19). If this was a capital contribution rather than a loan, the loss could not be taken as a bad debt deduction under Section 23 (k), *supra*, p. 2, regardless of whether the corporate entities of the wholly-owned corporations are to be ignored.

and held that taxpayer's wholly-owned corporations were not within the class thus described since the only disclosed reason for their organization and for their being kept in existence until their dissolution was to make it unnecessary for taxpayer from time to time to procure his wife's signature to some papers (R. 60). The court below further concluded that the case is one in which corporate form may be disregarded. That conclusion is consistent with the *Moline Properties* decision, which states that there are exceptions to the rule that a corporation is to be treated as a separate taxable entity and that "In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal". (P. 439.) Taxpayer argues that a business purpose is not required to sustain the reality of a corporation (Pet. 6-8)—an argument which is answered by the very statement in the *Moline Properties* decision on which he relies; that the purpose of the corporations was a "business purpose" (Pet. 8-10); and that that purpose was followed by the carrying on of business by the corporations (Pet. 10-11). Thus, taxpayer's assertion that the decision below is in conflict with, and erroneously applies, the *Moline Properties* decision is based upon nothing more than arguments to the effect that on its facts this is not a case where corporate form may be disregarded.

The decision below is, moreover, correct. The decision affirms the decision of the Tax Court which, as the court below stated (R. 58), did not regard taxpayer's wholly-owned corporations as non-existent for all tax purposes; instead, the Tax Court gave effect to their dissolution in the taxable year as the event which made it possible to determine gain or loss and, on the theory that taxpayer's advances to the corporations were capital investments, upheld the Commissioner's allowance of one-half of taxpayer's losses on the advances as long-term capital losses.[2] Taxpayer's wholly-owned corporations were disregarded as separate entities only with respect to the application of Section 23 (k) of the Internal Revenue Code, *supra,* p. 2, under which taxpayer claims that his losses are deductible in full as bad debts. As this Court stated in *Higgins* v. *Smith,* 308 U.S. 473, cited with approval in the *Moline Properties* decision, the Government is not required to acquiesce in the taxpayer's election of the form for doing business which is most advantageous to him; the Government may look at "actualities" and upon determination that the form employed for doing business is unreal or a sham "may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute" (p. 477). To result in bad debts

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[2] Under Section 117 of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 117) only 50 per cent of a capital loss is recognized if the capital asset has been held more than 24 months.

the advances taxpayer made to his wholly-owned corporations must have been loans. A loan presupposes a debtor and the facts of the case show that the corporations had no reality from the standpoint of being debtors of taxpayer—that, as both the Tax Court and court below held (R. 18, 61), from a practical standpoint, taxpayer's advances to the corporations were advances to himself. Taxpayer's argument that the corporations actually carried on business (Pet. 10-11) ignores the evidence reflecting that such business was taxpayer's personal business and that, as the court below stated (R. 60), the corporations served no purpose other than to make it unnecessary for taxpayer to secure his wife's signature to some papers. Such a purpose, contrary to taxpayer's contention (Pet. 8-10), quite plainly was not sufficient to establish the reality of the corporations as debtors separate and distinct from taxpayer himself. Cf. *United States* v. *Brager Building & Land Corp.*, 124 F. 2d 349 (C.A. 4th), and *Watson* v. *Commissioner,* 124 F. 2d 437, 439-440 (C.A. 2d).

The pendency of *Commissioner* v. *National Carbide Corp.,* 167 F. 2d 304 (C.A. 2d), certiorari granted, 335 U.S. 810, does not call for the issuance of a writ in this case. Quite apart from the obvious factual differences between the cases, this Court's decision in *Higgins* v. *Smith,* 308 U.S. 473, 477, points clearly to the difference in the questions of law involved. "A taxpayer is free to adopt such

organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages. On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute."[3]

CONCLUSION

The decision below is correct and involves no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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MARCH, 1949.

[3] See also, for example, *Gray* v. *Powell*, 314 U.S. 402, 414; *Titus* v. *United States*, 150 F. 2d 508, 511 (C.A. 10th), certiorari denied, 326 U.S. 773; *National Investors Corporation* v. *Hoey*, 144 F. 2d 466, 467 (C.A. 2d); *Clover* v. *Commissioner*, 143 F. 2d 570, 571-752 (C.A. 9th).

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